

**Before the
Federal Communications Commission
Washington, D.C.**

In the Matter of)	
)	
Implementation of Sections 716 and 717)	CG Docket No. 10-213
of the Communications Act of 1934, as)	
Enacted by the Twenty-First Century)	
Communications and Video Accessibility)	
Act of 2010)	
)	
Amendments to the Commission's Rules)	WT Docket No. 96-198
Implementing Sections 255 and 251(a)(2))	
of the Communications Act of 1934, as)	
Enacted by the Telecommunications Act)	
of 1996)	
)	
Accessible Mobile Phone Options for)	CG Docket No. 10-145
People who are Blind, Deaf-Blind, or Have)	
Low Vision)	
)	

COMMENTS OF TECHAMERICA

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April 25, 2011

TechAmerica hereby submits these comments to the Federal Communications Commission (“Commission”) in regard to the Commission’s Notice of Proposed Rulemaking (“NPRM”) concerning implementation of the Twenty-First Century Communications and Video Accessibility Act (“CVAA”).¹ TechAmerica’s members support the CVAA’s underlying goal of improved access to “advanced communications services” (“ACS”) for the disabled community.

Representing all sectors of the information technology industry, TechAmerica is the leading voice for the U.S. technology industry and welcomes this opportunity to provide the Commission with a viewpoint shared by such a diverse membership.

Introduction

TechAmerica shares the Commission’s desire to “ensure that 54 million individuals with disabilities are able to fully utilize advanced communications services and equipment and networks used for such services.”² As technology evolves rapidly it is assuredly important that individuals with disabilities continue to have access to groundbreaking and life-altering communications services and equipment.

Of course, as Congress well understood when drafting the CVAA, the provision of access to persons with disabilities must not lead to the stifling of the very innovation that all consumers, including those with disabilities, enjoy. Certainly, the Commission, in implementing the CVAA, must be mindful of the need to promote access while at the

¹ *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, FCC 11-37, (Released Mar. 3, 2011) (“CVAA NPRM”).

² CVAA NPRM at ¶1.

same time ensure that technological innovation continues to flourish. TechAmerica's comments below should assist the Commission in doing just that.

Definitions and Scope

To be sure, the Commission must act with prudence when determining the proper scope of the CVAA and how certain terms are defined. If the Commission interprets the CVAA too broadly, it may unnecessarily hinder the deployment of technologies and applications that consumers demand.

Liability Limitations for Third Party Applications is Proper

The Commission seeks comment regarding the extent of liability protection afforded to manufacturers and ACS providers in the CVAA. Specifically, the Commission inquires whether manufacturers or ACS providers are liable for third party applications that are installed or downloaded by the consumer.³ TechAmerica believes that Section 2(a) of the CVAA does generally preclude manufacturers and ACS providers from liability regarding applications offered by a third party, including those that are procured by a consumer via an "app store" or electronic download from a website. To hold otherwise would unnecessarily stifle the utilization of third party applications by manufacturers and ACS providers, as they would forego implementation of a third party application rather than risk liability for third party violations of the CVAA beyond their control. Congress did not intend such a result.

³ CVAA NPRM at ¶¶21, 27.

“Used for Advanced Communications Services”

The Commission asks to what extent Section 716(a) of the CVAA applies to equipment.⁴ TechAmerica believes that Section 716(a) only applies to equipment with a primary purpose of offering ACS. Equipment that is “capable” of offering ACS on a standalone basis or “merely supports ACS in some way” should not be covered by the CVAA.

“Advanced Communications Services”

In determining the scope of the term “advanced communications services,” the Commission specifically requests comment on how best to define “interconnected VoIP service,” “non-interconnected VoIP service,” “electronic messaging service,” and “interoperable video conferencing service.”⁵

Regarding “interconnected VoIP” service, Section 716(f) of the CVAA clearly indicates that Section 255 and Section 716 are mutually exclusive. Section 716 complements Section 255 to the extent Section 255 is not applicable. Thus, interconnected VoIP equipment and services should remain subject to Section 255 and not Section 716 of the CVAA.

In response to the Commission’s inquiry regarding the scope of the phrase “between two individuals” used in the definition of an “electronic messaging service” (“EMS”), TechAmerica believes that the plain language of the statute clearly indicates that the term does not encompass machine-to-machine communication or applications or functions that only provide access to EMS. To suggest otherwise would flout the

⁴ Id. at ¶22.

⁵ Id. at ¶¶29-47.

plain meaning of the term “individuals.” Rather, TechAmerica agrees with the Commission that the term applies to real-time or near real-time non-voice messages between individuals.

With respect to the term “interoperable video conferencing service,” TechAmerica requests that the Commission not broaden the scope of the term to include video conferencing services that are merely capable of providing real-time communications that enable users to share information. Further, the term “interoperable” should not be read out of the statute. The Commission proposes that the term “interoperable” is irrelevant and supports this belief by relying on the fact that previous versions of the CVAA did not include the word “interoperable” and the definition of the term “interoperable video conferencing service” in the enacted version of the CVAA mirrored the definition of “video conferencing service” in earlier versions of the bill.⁶ However, the rules of statutory construction make clear that the plain language of the statute takes precedence.⁷ Indeed, no word should be seen as superfluous.⁸ Taking this into

⁶ Id. at ¶135.

⁷ “[I]n interpreting a statute a court should always turn to one cardinal canon before all others...[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Indeed, “[w]hen the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” 2A Norman J. Singer, *Sutherland Statutory Construction* § 46:01 (6th ed. 2000); *Ex parte McCarde*, 74 U.S. (7 Wall) 506 (1868). This is the plain meaning rule, which has been expressed in many ways, all of which mean that, if the statutory language is clear, there should be no excursions outside the statute to search for a different meaning.

⁸ Statutes are to be interpreted so as “to give effect, if possible, to every clause and word of a statute.” *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted); *Ortloff v. United States*, 335 F.3d 652, 659 (7th Cir. 2003) (“In interpreting statutes, courts should disfavor interpretations of statutes that render language superfluous.”) (citations omitted).

consideration, the Commission must take the word “interoperable” at face value. Thus, the CVAA only applies to truly “interoperable” video conferencing services, i.e., services that are inter-network, inter-platform, and inter-provider communications.

Waiver Process

In enacting Section 716(h) of the CVAA, which provides the Commission authority to waive the requirements of Section 716 for any equipment or class of services that may be capable of accessing ACS but is “designed primarily for purposes other than using [ACS],”⁹ Congress provided the Commission a powerful tool to ensure technological innovation is not stifled and manufacturers of ACS equipment and ACS providers are not unnecessarily burdened.

The Commission should utilize the waiver process freely. Indeed, all equipment and services not primarily designed or marketed for ACS should be granted a waiver. Design and marketing evinces the intent of the provider or manufacturer as to the primary purpose of the device or service and is the most reliable evidence on which to rely when making a waiver determination. Moreover, the Commission should grant categorical waivers. Doing so improves efficiency and ensures a level playing field for all ACS manufacturers and providers. Waivers should not be restricted to a specific time period but should remain in effect so long as the conditions under which they were granted remain materially unchanged.

Regarding process, TechAmerica believes that confidential treatment of information is necessary and that public comment on waiver petitions is proper, provided the process is expedient. However, TechAmerica does have concern with the

⁹ 47 U.S.C. § 617(h)(1)(B).

Commission's proposal that the CVAA waiver process mirror the Commission's general Section 1.3 rules regarding waivers.¹⁰ Specifically, the Section 1.3 rules require a petitioner to demonstrate "good cause" in order to be granted a waiver of the Commission's rules. However, the CVAA's waiver provisions do not require such a showing. Indeed, all the CVAA requires is that a petitioner demonstrate that its product or service is (1) capable of accessing ACS; and (2) designed for multiple purposes but is designed primarily for purposes other than ACS. The waiver being sought is from the statute's requirements itself and not the Commission's rules implementing the statute, so the Commission's reliance upon its past precedent regarding waiver of its own rules is inapplicable. Further, a subjective showing of whether the requested waiver is in the "public interest" is not and should not be required.

Statutory Requirements under the Achievability Standard

TechAmerica agrees with the Commission and others that an assessment of what is achievable should be fact-based, flexible, and applied on a case-by-case basis.¹¹ TechAmerica further agrees that if the inclusion of a feature results in a fundamental alteration to the product or service, then it is *per se* not achievable to include that function.¹²

And while it is understood that the Commission is necessarily constrained to only consider the four stipulated factors in Section 716(g), TechAmerica is heartened that the

¹⁰ CVAA NPRM at ¶56.

¹¹ *Id.* at ¶69.

¹² *Id.*

Commission will “construe the factors broadly and weigh any relevant considerations in determining their meaning.”¹³

Nature and Cost of Steps Needed with Respect to Specific Equipment or Service

With respect to the first factor enumerated in Section 716(g), TechAmerica requests that the Commission not take into consideration competing products when determining the achievability of any certain product, but if this is not possible, then TechAmerica appreciates the Commission’s willingness to consider the “unique circumstances of each covered entity.”¹⁴ To the extent that product comparisons are used by the Commission, it should only compare products or services with similar features and price points. What is “achievable” in a high-end, fully-featured product may not be feasible in a lower-priced and more simplistic model.

TechAmerica disagrees with the contention that under this factor it is necessary for a covered entity to prove that accessibility is not achievable by demonstrating that the totality of the steps needed are “extraordinary” and that the cost of compliance, when compared to the entity’s entire budget, is “extraordinary.”¹⁵ Such a requirement is onerous and unnecessarily heightens the general statutory standard of “achievable.”

Indeed, the Commission should not consider an organization’s entire budget to be a determinative factor, but instead give greater weight to the revenue stream from the product or service in question.

¹³ Id. at ¶70.

¹⁴ Id. at ¶71.

¹⁵ Id. at ¶71, FN 209.

Within this framework, the Commission must also evaluate the costs of improvement and balance that with what customers are willing to pay for a device. If the cost of an accessibility feature under consideration exceeds the cost of having the product in the marketplace, then that particular accessibility feature is *per se* not achievable.

Technical and Economic Impact on the Operation

TechAmerica concurs with the Commission and others that the Commission should assess this factor by taking into consideration a covered entity's economies of scale and scope.¹⁶ Doing so will provide the Commission a comprehensive and holistic view of a covered entity's operations and will ensure a more reasoned decision.

Type of Operations

TechAmerica agrees with the suggestion that the Commission take into consideration a covered entity's status as a "comparatively new market entrant" in the ACS marketplace.¹⁷ This is consistent with the legislative history of the CVAA and ensures that nascent and groundbreaking products and services are not unnecessarily hindered.

Extent to which Offering Has Varied Functions, Features, and Prices

TechAmerica supports the Commission's proposal that where companies offer a range of accessible products that perform different functions at varied price points, such companies may not have to make a specific "inaccessible" product accessible.¹⁸ The

¹⁶ Id. at ¶70.

¹⁷ Id. at ¶73.

¹⁸ Id. at ¶75.

Commission should reject ACB's proposal for "dividing devices into classes and making certain that each class has at least one option that is fully accessible."¹⁹ Rather, the CVAA requires the Commission to view each class of products discretely on a case-by-case basis.

Implementation Requirements and Industry Guidance

The Commission asks a series of questions concerning how it should formulate obligations, objectives, and guidelines for industry to abide by when complying with the CVAA.²⁰ Inherent in the Commission's questions is to what extent the Commission should rely on its Section 255 rules or Section 508 Access Board Draft Guidelines or both as it develops obligations, objectives, and guidance for industry.

TechAmerica requests that the Commission rely on its Section 255 rules for the foundation of its rules implementing the CVAA. Reliance on the Section 508 Guidelines would be imprudent. The Section 508 Guidelines remain in draft form, cover a wider scope than the CVAA, and do not apply to commercial products sold to the general public. Moreover, the Commission should be mindful of not implementing rules that conflict with the Section 508 Guidelines.

With regard to the creation of safe harbors, TechAmerica agrees that the Commission should not establish technical standards in this context so as not to convert those standards into a de facto mandate. Rather, the Commission should establish an unbounded framework for adopting a number of different consensus-based and

¹⁹ Id. at ¶76.

²⁰ Id. at ¶¶99-117.

industry-led safe harbor standards, by permitting such forums to petition the Commission to accept their standards as a safe harbor standard.

Enforcement

TechAmerica requests that the Commission should encourage, if not require, potential complainants to first notify the defendant manufacturer or provider that it intends to file a complaint. Whatever burden is imposed on the complainant in this context is likely slight and does not outweigh the efficiencies that could be gained if the complaint is resolved first between the interested parties.

Additionally, the Commission should require complainants to first file an informal complaint before filing a formal complaint. Although the CVAA does not require this order of operations, such a requirement will ensure expeditious resolution, mitigate costs and burdens, and avoid hindering innovation unnecessarily.

Conclusion

TechAmerica appreciates the opportunity to provide guidance to the Commission as it implements the CVAA. The Commission must ensure that it honors the balance struck in the statute between promoting accessibility for persons with disabilities and ensuring that technological innovation continues to flourish. Provided the Commission respects the plain language of the CVAA; takes a holistic view of manufacturers' and providers' business challenges, costs, and products; and relies largely on its Section 255 rules in implementation of the CVAA, such a balance will be maintained.

Respectfully submitted,

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